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Leland v. Oregon supra

In the

UNITED STATES SUPREME COURT

October Term, 1940

No. 959

PHIL CHADWICK, ET AL, *Petitioners*

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

Come now Petitioners Phil Chadwick, Mrs. Phil Chadwick, Abe Chapman and Charley Schiffman, Appellants below, and petitioning for Writ of Ceritorari to the United States Circuit Court of Appeals for the Fifth Circuit, respectfully show:

STATEMENT OF THE CASE

When this case was called for trial Abe Chapman and Charles Schiffman were brought in from the penitentiary for trial, and not having been able to secure a lawyer the Honorable Maxwell Shapiro and Howard

Dailey were appointed to represent these petitioners. That thereafter Phil Chadwick and Mrs. Phil Chadwick presented their petitions to the United States Circuit Court of Appeals for the Fifth Circuit stating that they had exhausted their abilities to further prosecute their appeal and the United States Circuit Court of Appeals issued its order allowing them to proceed in forma pauperis. Therefore, this record is presented in forma pauperis.

On the 14th day of May, 1940, in Cause No. 7486-Criminal, there was returned into the United States District Court for the Northern District of Texas, at Ft. Worth, an indictment in 42 counts, against Louis Sherman, Emanuel Weiss, Charles Schiffman, Jack Leftak Moe Liss, B. Cooper, H. Grossberg, S. Dubinbaun, Abe Chapman, James Russo, Phil Chadwick, Mrs. Phil Chadwick, Nelson Harris, Jesse Harris, B. H. Schaffer, Bert Barkley, Glenn Cox, Charlie Beland, Dewey Ross, Marie Ross, Cliff Green, Henry Moore, Tommy Stobble, Albert Goldstein, George Taylor, Arthur C. Roberts, Charles Bernardi, Jerry Seigle, and Jacob Roamer.

The first 41 counts charged the defendants and each of them, with having violated certain provisions of the Harrison Anti Narcotic Act, and of the Drug Import and Export Act, and the 42nd count charged each of them with having conspired to so violate said provisions. The indictment also charged 92 overt acts done by the defendants in furtherance of the object of said conspiracy.

The defendants, Glenn Cox, Dewey Ross, Marie Ross, and Albert Goldstein, when called for arraignment, entered their pleas of guilty; that Tommy Stobble entered a plea of guilty to count 42, and not guilty as to counts 1 to 41, inclusive, and the rest of the defendants present for trial entered their pleas of not guilty; that thereafter, the defendants Cliff Green and Jacob Roamer withdrew their pleas of not guilty to Count 42 and entered thereto a plea of guilty, and not guilty as to counts 1 to 41, inclusive.

The defendants Emanuel Weiss, B. Cooper, H. Grossberg, S. Dubinbaun, James Russo, and Jerry Seigle were not present for trial, and the trial proceeded as to the remainder of the defendants.

That on the 17th day of July, 1940, at the conclusion of the trial, the jury found the defendants Glenn Cox, Dewey Ross, Marie Ross, and Albert Goldstein guilty as charged in the indictment, and as pleaded by them; that Louis Sherman was found not guilty; that Charles Schiffman was found guilty in counts 1 to 6, inclusive, and count 42; that Jack Leftak was found not guilty as charged in counts 1 to 10, inclusive, and guilty in count 42; that Moe Liss, alias Tommy Cooper, was found guilty in counts 1 to 10, inclusive, and count 42, and not guilty as charged in counts 11 to 41, inclusive; that Abe Chapman was found not guilty as charged in counts 11 to 41, inclusive, guilty in counts 1 to 6, inclusive, and count 42; that Phil Chadwick was

found not guilty in counts 1 to 6, inclusive, and guilty in counts 7 to 42; that Mrs. Phil Chadwick was found not guilty as charged in counts 1 to 6, inclusive, and guilty in counts 7 to 42; that Nelson Harris was found not guilty as charged in counts 1 to 10, inclusive, and counts 38 to 41, inclusive, and guilty of count 42; that the defendant Jesse Harris was found not guilty; that the defendant, B. H. Schaffer was found not guilty as charged in counts 1 to 10, inclusive, and guilty in count 42; that Bert Barkley was found guilty in count 42; that Charlie Beland was found guilty in counts 16-18-42; that Cliff Green was found not guilty as charged in counts 1 to 41, inclusive, and guilty as charged in count 42; that Henry Moore was found not guilty in counts 1 to 10, inclusive, and found guilty in count 42; that Tommy Stobble was found not guilty as charged in counts 1 to 10, inclusive, and guilty in count 42; that George Taylor was found guilty in count 42; that Arthur C. Roberts was found guilty in count 42; that Jacob Roamer was found not guilty as charged in counts 1 to 41, inclusive, and guilty of count 42.

That the findings of the jury was silent as to their disposition of the various counts against the defendants not named in their verdict, as above set out; that Charlie Beland was sentenced to serve 5 years, generally, on counts 16 to 42, and for a period of 10 years on count 18, five years to be served, and the ten years to be suspended on count 18; that Phil Chadwick was sentenced to serve 12 years, generally, in the United

States Penitentiary at Leavenworth, Kansas; that Mrs. Phil Chadwick was sentenced to serve 2 years in the woman's reformatory at Alderson, West Virginia, on count 42, and 5 years, generally, on counts 7 to 41, inclusive, and the execution of said sentence on counts 7 to 41, inclusive, was suspended by allowing the defendant to be placed on probation for 5 years after execution of sentence on count 42; that Abe Chapman was sentenced to serve 8 years in the United States Penitentiary, at Leavenworth, Kansas, generally, on counts 1 to 6, inclusive, and for 2 years on count 42, which said sentence on count 42 was to be suspended for 5 years, after the execution of the sentence imposed on counts 1 to 6; that Charles Schiffman was sentenced to serve 10 years, generally, and to be served consecutively with any other sentence.

That in due course, the defendants, Phil Chadwick, Mrs. Phil Chadwick, Abe Chapman, Charles Schiffman, Charlie Beland, and Bert Barkley filed their notice of appeal, and thereafter perfected such appeal to the United States Circuit Court of Appeals.

That prior to the arraignment of your petitioners they and each of them filed their General Demurrer and Motion to Quash (Tr. 63); that this General Demurrer and Motion to Quash having been overruled, they then filed Petition for Severance (Tr. 64); the General Demurrer and Motion to Quash and Petition for Severance having been overruled they filed their

petition to require the United States District Attorney to elect upon which count, or counts, he would prosecute each of your petititoners (Tr. 66), which said petition was also overruled by the Court.

The United States Circuit Court of Appeals for the Fifth Circuit on the 18th day of February, 1941, after the case had been duly appealed, briefs filed, arguments made, affirmed the decision of the Court below, except as to Beeland and Barkley. The opinion of the Court in affirming the case as to these petitioners appears Tr. 931. They then duly filed their petition for rehearing on March 18, 1941, which was by said Honorable Circuit Court of Appeals overruled the 20th day of March, 1941, without written opinion.

STATEMENT AS TO JURISDICTION

Jurisdiction of this case is conferred upon the Supreme Court by Section 347a U.S.C.A., Title 28. The opinion of the Circuit Court of Appeals appears Tr. 931.

QUESTIONS PRESENTED

1. *Whether the trial court erred in overruling appellants' general demurrer and motion to quash the indictment on the ground that there was a fatal misjoinder of persons and offenses.*

This was assigned as error below (Tr. 63).

2. *Whether the trial court erred, after the general demurrer and motion to quash seasonably filed and presented, was overruled, in failing and refusing to grant to petitioners and each of them, a severance.*

This was urged as error below (Tr. 64).

3. *Whether the trial court erred, after the general demurrer and motion to quash, and petition for severance had been overruled, in failing and refusing to require the United States District Attorney to elect upon which count, or counts, he would prosecute each of your petitioners.*

This was urged as error below (Tr. 66).

4. *Whether the trial court erred in failing and refusing to sustain your petitioners' motion for a mistrial because of the prejudicial and inflammatory remarks made by the United States District Attorney in his address to the jury, duly and seasonably made at the time the remarks were so made by the said The United States District Attorney* (Tr. 956-957), *which was urged as error below.*

5. These petitioners urged in their appeal to the United States Circuit Court of Appeals for the Fifth Circuit eleven propositions of error, which they here now urge as grounds for this petition, supplemental and in addition to the questions above set out, as follows:

PROPOSITION 1.

Where an indictment, containing 42 counts, naming 29 defendants living in various parts of the United States, alleging that some of the offenses were committed in one state, and some in another, it is not within the sound discretion of the Court to refuse to order the United States District Attorney to furnish the defendants a bill of particulars as to just what each of their connections were with the substantive offenses alleged, although the indictment contained one count of a general conspiracy. (Assignment of errors No. 1.)

PROPOSITION 2.

Although when there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts, yet 29 defendants, operating in several separate and distinct parts of the United States, committing different crimes, separate and distinct, complete in themselves, in no way connected with offenses committed by the others, some of which were committed by some of the defendants at one time, and others of which were committed by others of the defendants at other and different times, cannot be joined in the same indictment. (As-

signments of errors Nos. 2, 3, 4, 6, 7, 8, 14, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, and 32.)

PROPOSITION 3.

Where a defendant is on trial for a crime, and does not take the stand in his own behalf, or for another, and does not, by testimony offered, place his reputation in issue, it is prejudicial error to either offer testimony as to the bad character or reputation of that defendant, or for the prosecuting attorney, in the presence of the jury, to charge that defendant with a bad reputation, or to refer to the fact of his incarceration in prison. (Assignments of errors Nos. 11, 12, and 18.)

PROPOSITION 4.

Where a defendant has been indicted and is on trial for a certain crime, it is prejudicial error for the Government to offer proof tending to show that he is probably guilty of other, separate, distinct, and extraneous crimes. (Assignments of error Nos. 13, and 15.)

PROPOSITION 5.

Where testimony is offered, or remarks made in the presence and hearing of the jury by the prosecuting attorney, of such inflammatory nature as would be calculated to inflame the minds of the jury, create resentment, or unduly prejudice the minds of such jury

against defendants on trial, it is such prejudicial error that might not likely be erased from the minds of the jury by the instructions of the Court to disregard same. (Assignments of error Nos. 13, 15, 29, 34, and 35.)

PROPOSITION 6.

Where several defendants are on trial for a crime, and do not take the witness stand in their own behalf, it is error for the Court, without request of the defendants, to charge the jury on such failure of defendants to testify, because it unduly emphasizes such fact, and is calculated to lead the jury to believe such defendants are guilty because they did not deny their guilt as witnesses. (Assignment of error No. 9.)

PROPOSITION 7.

While appellants concede that where a conspiracy has been charged in an indictment against several defendants, and it has been proved by the evidence beyond a reasonable doubt, the acts and transactions of one so charged, in furtherance of this conspiracy, becomes the acts and transactions of the others, yet it is error for the Court to fail and refuse to charge that such acts or transactions by one conspirator cannot become the acts or transactions of the others unless and until the jury finds and believes, from the evidence, beyond a reasonable doubt that such others were members of the same conspiracy, as the declarator or actor,

and that such acts or transactions were in furtherance of the object of the conspiracy. (Assignment of error No. 36.)

PROPOSITION 8.

Where several defendants are on trial for a crime, under an indictment charging one count of general conspiracy, and 41 substantive offenses, and it develops upon the trial of this case that there was a fatal misjoinder of persons and offenses, and that the proof did not sustain the indictment as alleged, it was error for the Court to fail and refuse to instruct a verdict of not guilty. (Assignment of Error same as under Proposition No. 2, and Assignment of Error No. 37.)

PROPOSITION 9.

Where a verdict of the jury is returned into Court upon an indictment containing several counts, and that verdict is so vague, indefinite, incomplete that it does not dispose of such issues in the indictment, upon which a plea of former jeopardy may be predicated, it is fatal error for the Court to fail and refuse to sustain appellants' motion in arrest of judgment. (Assignments of Error Nos. 2, 3, 4, 6, 7, 8, and 38.)

PROPOSITION 10.

A Sentence of the Court cannot be based on a count of an indictment where the jury's verdict does not

specifically include such count in its finding of guilt. (Assignment of Error No. 39.)

PROPOSITION 11.

Where a certain letter alleged to have been written by a defendant on trial for a crime, and containing certain admissions tending to establish his guilt, is admitted into evidence, it is prejudicial error to allow the United States District Attorney to display before the jury genuine specimen of that defendant's handwriting, enlarged to the proportion of six to one for the use of a handwriting expert, as tending to overly emphasize the importance of the letter. (Assignment of Error No. 33.)

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

1. In holding that Petitioners' aassignment of error as to the action of the trial court in overruling their general demurrer and motion to quash, petition for severance, and petition for order requiring the United States District Attorney to elect upon which count, or counts he would prosecute each of your petitioners did not adversely affect a substantial right of your petitioners, is in conflict with the well settled decisions of this the Honorable United States Supreme Court and particularly in conflict with McElroy v. U. S., 164 U. S. 76, 41 L. Ed. 355, followed and supported also by:

Coco v. U. S., 198 Fed. 289, Fed. 33;

Wyatt, et al v. U. S., 23 F. (2d) 791; 227 U. S. 588, 72 L. Ed. 1002;

L. Rosa, et al v. U. S., 15 Fed. (2d) 749;

Edenfield, 8 Fed. (2d) 614 (reversed), 273 U. S. 660; 71 L. Ed. 827;

De' Luca v. U. S., 298 Fed. 412;

Vaccaro v. U. S., 30 Fed. (2d) 678.

2. In holding that an instruction by the trial court to disregard the inflammatory argument made by the United States District Attorney cured whatever error that might have been committed, is in conflict with the well settled decisions of all the Courts, including this Honorable Court, and particularly with the doctrine announced in Ruling Case Law, Vol. 22, page 12, and the decisions cited thereunder; also in conflict with the doctrine set out in 2 Ruling Case Law, Page 35, and the decisions thereunder cited, and particularly holding that where such remarks of the United States District Attorney are of such inflammatory nature as the harmful results of such remarks might not likely be cured by the instructions of the Court to the jury to disregard same, conviction will be set aside regardless of such instructions of the trial court.

3. Whether, as to Mrs. Phil Chadwick, the finding by the jury of guilty "from counts 7 to 42" amounted to finding her guilty on count 42 (Tr. 979).

Attorney for Petitioners.